

EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, : 72CV00356(RJD)
Plaintiff,
-against- : United States Courthouse
KEVIN HAYNES, : Brooklyn, New York
Defendant. : Thursday, December 13, 2018
3:00 p.m.

TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE RAYMOND J. DEARIE
UNITED STATES SENIOR DISTRICT JUDGE

APPEARANCES:

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1 THE COURTROOM DEPUTY: We are on this afternoon for
2 a status conference. This is *USA versus Kevin Haynes*, docket
3 number 93-CR-1043.

4 Can I ask the attorneys to please note their
5 appearance beginning with counsel for the Government.

6 MR. RICHARDSON: Good afternoon, Your Honor. Ian
7 Richardson for the United States.

8 THE COURT: Good afternoon.

9 MR. SARRATT: Good afternoon, Judge. David Sarratt
10 of Debevoise & Plimpton for Mr. Kevin Haynes. I'm joined by
11 Marisa Taney and by my colleague, Renee Garrick, who is not
12 yet admitted in the Eastern District of New York, but with,
13 Your Honor's permission she'll stand for this appearance.

14 THE COURT: Well, well, it is a close call. I am
15 happy to have you here. Welcome back.

16 MR. SARRATT: Thank you, Judge. It's a pleasure to
17 be here.

18 THE COURT: So, there is very little I can do at
19 this point but listen.

20 MR. SARRATT: I'm happy to say a bit about why we
21 asked for the conference. As Your Honor is aware, we've
22 written a couple of different letters to the U.S. Attorney's
23 Office and then to Your Honor laying out why we think
24 Mr. Haynes is really the picture-perfect candidate for relief
25 that is, in my view, unquestionably available to the

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1 Government which is that they make a motion pursuant to
2 Federal Rule of Criminal Procedure 48 asking Your Honor to
3 dismiss the third of three 924(c) counts that were stacked.

4 In response to Mr. Haynes' decision to exercise his
5 Constitutional right to go to trial, the Government, as Your
6 Honor probably recalls, had offered Mr. Haynes a plea
7 agreement that would have likely resulted in a guideline
8 sentence; the bottom range of which would carry about seven
9 and half years of imprisonment.

10 But unlike his co-defendant, Mr. Haynes elected to
11 go to trial. His co-defendant, by the way, had been the
12 organizer of the four robberies that were the subject of the
13 case and at that time had four prior robbery convictions
14 already. The co-defendant, Mr. Rivers, was nonetheless
15 sentenced by Your Honor to approximately ten years in prison.

16 THE COURT: I sentenced him but I did not sentence
17 Mr. Haynes.

18 MR. SARRATT: I believe you did sentence Mr. Haynes,
19 but you did not try the case. It was a visiting judge who
20 tried the case. After Mr. Haynes exercised and expressed his
21 desire to have a trial, the Government sought a superseding
22 indictment which added two additional counts under Section
23 924(c) which then made the resulting minimum sentence for the
24 Court to impose following his conviction of trial of 45 years.
25 Unfortunately, that was the sentence that the Court was bound

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1 to impose at that time; a sentence that was obviously more
2 than four and a half times the sentence that the government
3 thought appropriate for the clearly more-culpable
4 co-defendant.

5 And also, you know, gosh, it's hard for me to even
6 do the math of how many times it exceeds the amount that the
7 Government in its plea offer thought was appropriate to serve
8 the interests of justice in the case. As it stands now,
9 Mr. Haynes has served more than three times the sentence that
10 would have been imposed had Mr. Haynes accepted the
11 Government's plea offer, had he not exercised his right to
12 trial. So we can stay here until tomorrow for me to go
13 through the members, distinguished members, of the Criminal
14 Justice system who have spoken up and noticed the injustice of
15 the practice to which Mr. Haynes was subjected and that he was
16 a victim of, but I think it bears saying again that even
17 people who have committed serious crimes can be the subject of
18 injustice. In my view, it is abundantly clear that that was
19 the case here.

20 It's also abundantly clear that the Department of
21 Justice in this case has clear legal authority to remedy this
22 wrong and to prevent Mr. Haynes from spending the next 15-odd
23 years of his life in prison serving a sentence that I think
24 people from Jeff Sessions to more progressive legal scholars
25 have acknowledged and that the Congress is on the cusp of

1 acknowledging on a forward-going basis is unjust and unfair,
2 is excessive.

3 And I think, as Your Honor is aware, this is not the
4 first time we've made this request to the Department of
5 Justice. Although the Department of Justice in many cases
6 before has agreed to similar requests beginning in the
7 *Holloway* case in this district and beginning with *Loretta*
8 *Lynch*, under whom our current U.S. Attorney served as the
9 chief of the criminal division for a period of time.

10 So I think if you go through the cases in which the
11 Government has agreed to this relief and which courts have
12 been followed by re-sentencing the defendant, having dismissed
13 one of those 924(c) cases, they have a common characteristic
14 which is that they come after the urging of the Court. So it
15 is our hope that in seeking the status conference today that
16 Your Honor could take this opportunity if you are so inclined
17 to express your own views of the case and your own views about
18 what the just result here would be. They would certainly be
19 welcome to us and to my client.

20 I think, Judge, fundamentally it is always the
21 Department of Justice's policy and should always be the policy
22 of the Department of Justice to live up to that name and to do
23 justice where the law allows and I think the path of justice
24 here is very clearly illuminated and their legal authority to
25 do what we are asking in our motion is equally clear. And,

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1 so, you know, respectfully we would ask for the Court's
2 encouragement for the Department of Justice to do just that in
3 this case.

4 THE COURT: Well, first of all, I apparently did not
5 sentence Mr. Haynes. I'm looking at the JFC. It is not my
6 signature. It looks like Judge Hillman's signature. I know
7 that Judge Hillman conducted the trial and signed the
8 judgment.

9 MR. SARRATT: Then I may be mistaken about the
10 sentencing, Judge.

11 THE COURT: It is neither here nor there, but just
12 so the record is clear --

13 MR. SARRATT: I can see why it's material to Your
14 Honor. Oftentimes you are called on to do things that perhaps
15 especially in cases like this, you impose a sentence that you
16 don't feel is right and you don't want to have to do and so if
17 it's one fewer times that Your Honor has to do it, I
18 apologize.

19 THE COURT: It is not only that but I think, to be
20 candid, if I imposed this sentence, I would remember it
21 because it is true; we are from time to time called upon to
22 impose sentences that we think are unjust. I will leave it at
23 that. Has the criminal department written back?

24 MR. RICHARDSON: I don't know if the department has
25 written back, Your Honor. I know that under successive U.S.

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1 attorneys, there have been conversations with Mr. Sarratt and
2 his counsel about motions like these. I can't remember if it
3 was specifically in reference to Mr. Haynes' case.

4 I understand Mr. Sarratt's position about that he
5 believes there is clear legal authority to do what he is
6 suggesting that the Government should agree to do. Two
7 different grounds have been asserted in various letters that
8 have been sent to the Department of Justice by Mr. Sarratt and
9 the lawyers at Debevoise. The first is that a motion can be
10 filed under Federal Rule of Civil Procedure 60(b) to permit
11 the case to be reopened and the judgment to be vacated and
12 that would permit, I believe, the grant of a 2255.

13 And then the second and more-recent justification
14 was that we could use -- the Government could agree, pursuant
15 to Federal Rule of Criminal Procedure 48, to dismiss the
16 indictment or some count of the indictment. I think there
17 are -- there are two different problems with those. The first
18 is that the case law is clear that a Rule 60(b) motion is
19 treated in the context of AEDPA as a successive petition and
20 Mr. Haynes has already filed a petition under or a motion
21 under 2255 that Your Honor denied, I believe, in 2004.

22 He currently has another -- a successive petition
23 pending before this court that has been stayed while his
24 motion to file that successive petition is pending before the
25 Second Circuit. He filed that in connection with the *Johnson*

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1 litigation in 2016 and that has been stayed by the Second
2 Circuit while we wait finality in the *Barrett* case.

3 THE COURT: Finality seems like it will never come.

4 MR. RICHARDSON: I share your pessimism, Your Honor.
5 So that is the AEDPA Rule 60(b) civil front. And the issue
6 there being that without authorization from the Court of
7 Appeals, this court would lack jurisdiction.

8 THE COURT: Of course.

9 MR. RICHARDSON: So that is the reason why 60(b) is
10 not -- cannot be the basis for action here.

11 THE COURT: I did not hear Mr. Sarratt make a Rule
12 60(b).

13 MR. RICHARDSON: In one of the first letters that
14 Mr. Sarratt filed that was the basis. The more recent basis
15 that Mr. Sarratt relied on is Rule 48 and he asserts that he
16 believes it is clear the Government has the ability to agree,
17 even post-conviction, to dismiss an indictment. I don't share
18 his optimism about that authority and, candidly, Your Honor, I
19 haven't had time to do extensive research on the question but
20 the research that I have seen casts doubt on the ability of
21 the prosecution after the conviction has become final, after
22 the appeals have been exhausted, to dismiss a count of the
23 indictment of the information and that's because the rule
24 relates to the dismissal of a prosecution. There simply is no
25 prosecution left after the defendant has been found guilty and

1 has exhausted his appeals. The case -- Mr. Sarratt cited a
2 number of cases; one of which was a DC Circuit opinion and
3 that case is curious because while the DC found that Rule 48
4 was a claims processing rule, that was significant because the
5 defendant in that case who was the one objecting to the
6 dismissal post conviction of one of the counts at issue in
7 that case had forfeited his objection.

8 So, the Court of Appeals said we don't need to reach
9 the jurisdictional issue because it wasn't implicated and then
10 in dicta cast doubt on the ability of Rule 48 to actually
11 allow some sort of post-conviction relief. I think there are
12 significant jurisdictional and legal obstacles and concerns
13 with that proposal that has been suggested here. But this
14 case is one in which the defendant has a pending motion for
15 successive petition that is pending before the Second Circuit.
16 If the caselaw works out the way he wants it to, it could well
17 result in remands and vacatur of his original sentence and
18 remands and until we have exhausted that process, until we
19 have gone through that process, the process that was
20 established in statute and is familiar to this court and
21 federal courts across the country who do this routinely, we
22 should allow that process to play out before considering and
23 discussing significantly more worrisome and troublesome
24 options that have been suggested by counsel.

25 THE COURT: Is this the Office's position?

1 MR. RICHARDSON: Your Honor -- at this stage, Your
2 Honor, I have consulted with the management of the office on
3 this point and there are significant concerns about the legal
4 basis for this. Those concerns have been communicated I
5 understand in connection with Rule 60(b). I'm not sure if the
6 discussion was had with respect to the Rule 48 proposal, but
7 there are significant concerns on a legal basis for carrying
8 this out and, you know, if -- I think at that point that is
9 what I am prepared to say, Your Honor.

10 THE COURT: So the answer to my question is no?

11 MR. RICHARDSON: Yes. It is the position of the
12 Office that this is not something that we should be doing,
13 particularly when there's significant questions about the
14 lawful basis to do what the defendant is asking us to do.

15 THE COURT: So justice shouldn't it come, but we
16 will just have to wait? What about let's cut through the
17 technicalities and I grant you your argument, particularly
18 with respect to Rule 60(b), but if there is a recognition that
19 there's a wrong here that should be corrected, and maybe I
20 state a premise that is unfounded, but I have a feeling
21 there's some sense that this sentence is woefully excessive
22 then there's got to be a way to resolve it without revising
23 the wherefores of 60(b) or Rule 48. So if there's injustice
24 it has to be corrected.

25 MR. RICHARDSON: There is, Your Honor, there always

1 is and it's set forth the power of the executive to grant
2 clemency and Mr. Haynes is free to make a request to the
3 executive for that clemency, but that is power that is
4 committed structurally to the President and not to the United
5 States attorneys.

6 THE COURT: I am profoundly disappointed in your
7 reaction to this and I do not mean to cite a recent example
8 because I do not want to be accused of taking advantage of
9 what I think was an irresponsible position by the U.S.
10 Attorney in another case that I presided over and it involves
11 the tamil terrorists. I have read it and, to be totally fair,
12 the decision, because of the nature of that case, had to be
13 made in DC, but it wasn't going to be made favorable to these
14 defendants without the support of the United States Attorney
15 for the Eastern District. It is the general sense that what
16 happened should not have happened and to your office's great
17 credit, it was resolved. And it was, as I often said, one of
18 the very few cases that kept me awake at night. That is why I
19 knew for a fact that I did not sentence this chap.

20 So that is it? That is your position? Well, that
21 is astounding to me. This is just -- this is a problem that
22 has to be corrected.

23 Have you made a formal motion yet?

24 MR. SARRATT: I guess --

25 THE COURT: Beyond the now-pending and state

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1 application.

2 MR. SARRATT: To perhaps separate the two matters,
3 we do not represent Mr. Haynes on the Johnson successive
4 petition, but if I may suggest a path that perhaps would
5 represent a way forward, we would be pleased to make in this
6 matter a motion that Your Honor grant the relief conditioned
7 upon agreement of the Government in which it would seem to me
8 that perhaps Your Honor could assess, perhaps to the
9 Government's satisfaction, the legal question that
10 Mr. Richardson has raised about whether Rule 48 allows the
11 kind of relief that we are seeking. I think it's a question
12 that if the procedural posture of the *Smith* case in the DC
13 Circuit was overly elaborate or offered a distinction that
14 escapes me, the *Rice versus Rivera* case in the Fourth Circuit
15 I think addressed very nearly this precise situation head on.

16 In that case the Court stated very clearly that
17 although the federal courts have rarely been asked to confront
18 the issue, we are constrained to agree that some measure of
19 jurisdiction over a criminal prosecution remains with a
20 sentencing court even after conviction and appeal. And in
21 that case the Court, despite a final conviction, granted the
22 Government's motion to dismiss a count in the indictment and
23 on that basis resentence the defendant.

24 So I would be happy to make such a motion before
25 Your Honor if Your Honor would be willing to rule on that

1 question and address the question about legalities as to which
2 Mr. Richardson has question. A Court in this district has
3 already spoken to this issue in the *Holloway* case. And it was
4 one in which the attorney in that case did agree with the
5 Court's encouragement. So if a motion of that nature would be
6 of assistance, it would be my pleasure to file it.

7 THE COURT: Well if there's a recognition that the
8 sentence imposed is greater than necessary given the
9 legitimate and recognized purposes of sentencing -- is there
10 such a recognition?

11 MR. RICHARDSON: Your Honor at this stage I'm not
12 taking a position one way or the other on the substance of the
13 claim whether this would be -- whether a similar decision
14 would be made now that was made back in 1993, I really -- I
15 think it's unlikely that a similar charging decision could be
16 made now, but it is not the position that I am in to
17 reconsider the exercise of prosecutorial discretion made 25
18 years ago by Assistants and the United States Attorney at the
19 time.

20 The issue that I am confronting is whether it is
21 legal and appropriate for our office to agree to the kind of
22 relief that the defendant has sought here and to Your Honor's
23 point about there being a way, there is -- there is clemency.
24 Our Constitution provides for it and the defendant, as far as
25 I know, has not made a request for that kind of relief.

1 MR. SARRATT: I guess if I could add one thing in
2 response to Your Honor's prior question. I believe there is a
3 recognition on both sides of this case that the sentence was
4 excessive and it's far more than was necessary in the case and
5 one that exceeded the boundaries of justice and based on my
6 prior conversation with Mr. Gattick (phonetic) who was
7 previously the chief of the criminal division, I believe at
8 least certain times, and at the time I spoke to him, that
9 there was recognition on both sides of this case that that was
10 a common set of facts and there was some disagreement over
11 what the appropriate procedural mechanism for remedy would be,
12 but we have not gotten an official response to the request
13 that we made pursuant to Rule 48.

14 THE COURT: Well, make your motion Mr. Sarratt.

15 MR. SARRATT: I will be pleased to.

16 THE COURT: And I also want to state for record that
17 one of my law clerks is an alumna of your shop and is, as the
18 laws of random chance turn out, is assigned to this matter.
19 If either one of you would be more comfortable for me to
20 reassign it to another law clerk I will do that.

21 MR. SARRATT: No objection from me.

22 MR. RICHARDSON: None from the Government, Your
23 Honor.

24 THE COURT: Thank you, gentlemen. When might I
25 expect your application, Mr. Sarratt?

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1 MR. SARRATT: My only hesitation is the holiday
2 calendar.

3 THE COURT: Come up with a date you are comfortable
4 with, Mr. Richardson.

5 Ellie, work out a briefing schedule and I will see
6 you next time. Happy holidays.

7 (Matter adjourned.)

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